

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS  
SIXTH JUDICIAL DISTRICT, FIFTH DIVISION

60CV-21-3138

LEAGUE OF WOMEN VOTERS OF ARKANSAS  
ARKANSAS UNITED  
DORTHA DUNLAP  
LEON KAPLAN  
NELL MATTHEWS MOCK  
JEFFERY RUST

PLAINTIFFS

JOHN THURSTON, In his official capacity as the  
Secretary of State of Arkansas  
WENDY BRANDON,  
SHARON BROOKS,  
JAMIE CLEMMEE,  
BELINDA HARRIS-RITTER,  
WILLIAM LUTHER,  
J. HARMON SMITH, each in their official capacities  
as members of the  
State Board of Election Commissioners of Arkansas

DEFENDANTS

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND MEMORANDUM  
ORDER GRANTING DECLARATORY JUDGMENT AND PERMANENT  
INJUNCTIVE RELIEF**

The parties appeared for bench trial on March 15, 16, 17, and 18,  
2022. Jess Askew, Kevin Hamilton, Matthew Gordon, Harleen Gambhir,  
Jessica Frenkel, and Alexi Velez appeared for Plaintiffs. Brittany Edwards,  
Trey Cooper, and Kesia Morrison appeared for Defendants.

The Court heard testimony from Dortha Jeffus Dunlap, Nell Matthews  
Mock, Jeffery Rust (by video deposition), Dr. Patsy Watkins, Bonnie Miller

(testifying virtually as President, League of Women Voters of Arkansas and its Washington County chapter), Lesley Mireya Keith (Founding Director, Arkansas United), Commissioner Sharon Inman (Pulaski County Board of Election Commission), Dr. Linton Mohammed, Dr. Kenneth Mayer (who testified virtually), Director Daniel Shults (State Board of Election Commissioners), and Joshua Bridges (Election Systems Analyst, Arkansas Secretary of State). The parties stipulated to the admission of numerous documentary exhibits. Before Plaintiffs rested their case, their counsel (Kevin Hamilton) orally moved, without objection, to substitute Wendy Brandon and Jamie Clemmer as Defendants, in their official capacities as members of the State Board of Election Commission in place of former Commissioners James Sharp and Charles Roberts. The Court granted that motion.

Defendants moved for directed verdict after Plaintiffs rested, renewed that motion after the Court denied it, and again renewed their motion for directed verdict after Plaintiffs did not present rebuttal evidence. The Court denied the motions for directed verdict at each juncture. The Court announced from the bench its finding that each of the challenged enactments violates provisions of the Arkansas Constitution which guarantee the right to vote. Accordingly, the Court permanently enjoined

the operation of each enactment. The parties submitted proposed findings of fact and conclusions of law on March 21, 2022. This memorandum opinion and judgment details the findings of fact and conclusions of law upon which the Court's decision rests, and the Court's analysis of the legal issues and proof presented during trial.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. This Court has subject matter jurisdiction pursuant to Amendment 80 to the Constitution of Arkansas. This Court has personal jurisdiction over the Defendants under Ark. Code Ann. § 16-4-101(B). Venue is proper in Pulaski County under Ark. Code Ann. § 16-60- 104(3)(A).
2. The League of Women Voters of Arkansas (the "League") and Arkansas United (collectively, the "Organizational Plaintiffs") filed their Complaint for Injunctive Relief and Declaratory Judgment on May 19, 2021. Plaintiffs Dortha Dunlap, Leon Kaplan, Nell Matthews Mock, Jeffery Rust, and Dr. Patsy Watkins (collectively, the "Voter Plaintiffs") joined the Organizational Plaintiffs in filing an amended complaint on July 1, 2021.
3. Act 736 was enacted into law on April 15, 2021, following its passage by the General Assembly. Act 736 requires election officials to examine and verify the signature on voters' absentee ballot

applications to determine if it is similar to a single comparator: the signature on the individual's voter registration application. Ark. Code Ann. § 7-5-404 (2021);

4. Act 973 was enacted into law on April 27, 2021. Act 973 moves the deadline for delivery of absentee ballots in person from the Monday before election day to the close of business of the county clerk's office on the Friday before election day. Id. §§ 7-5-411(a)(3), (4) (2021). Meanwhile, absentee ballots returned by mail are timely if received by 7:30 p.m. on election day. Id. § 7-5- 411(a)(1)(A) (2021). Act 973 thus (a) reduces the number of days voters have to return absentee ballots in person, and (b) creates different deadlines based on how an absentee ballot is returned. See Ark. Code Ann. §§ 7-5-404 (2021), 7-5-411 (2021).
5. Act 249 was enacted into law on March 3, 2021, following its passage by the General Assembly. Act 249 eliminates the affidavit failsafe for voters who lack qualifying identification. Previously, a voter without compliant photo identification could cast a provisional ballot that would be counted, without any further action, if the voter completed an affidavit under penalty of perjury at the polls (or, if voting absentee, completed and returned a sworn statement) stating the

voter is the person whose registration information was on the ballot. Ark. Const. amend. 51 § 13(b)(4)(A)(i)(a) (amended 2021). Act 249 removes that option, requiring an individual who does not present a compliant identification, whether in person or enclosed with an absentee ballot, to present compliant photo identification to the county board of elections in person within six days after election day.

6. Act 728 was enacted into law on April 15, 2021, following its passage by the General Assembly. Act 728 prohibits anyone from entering or remaining within a 100-foot perimeter of a polling place's main entrance unless doing so for "lawful purposes." Ark. Code Ann. § 7-1-103(a)(24) (2021). Violations of Act 728 are a class A misdemeanor, punishable by a fine of up to \$2,500 and up to one year in county jail. *Id.* §§ 5-4-201(b)(1) (2009), 5-4-401(b)(1) (2019); see also *id.* § 7-1-103(b)(1) (2021). Any individual convicted of violating Act 728 becomes "ineligible to hold any office or employment in any of the departments in" the State, and if a State employee already, "shall be removed from employment immediately." *Id.*

7. Plaintiff Dortha Jeffus Dunlap is an 86-year-old citizen of the United States and resident of Springdale, Arkansas. She is a retired employee of the United States Census Bureau, has been a member

of the League of Women Voters for almost 53 years, first registered to vote in 1957 when she turned 21, and last updated her registration in 2017, when she moved to her current residence. Plaintiff Dunlap is a registered voter.

8. Plaintiff Patsy Watkins, Ph.D., is a 74-year-old citizen of the United States, resident of Fayetteville, Arkansas, and member of the League of Women Voters of Arkansas. Dr. Watkins has lived in Arkansas since 1983 and in Fayetteville for the past 23 years. Dr. Watkins retired from the University of Arkansas in 2017, where she served as a professor of journalism for approximately 34 years. Dr. Watkins is a registered voter.

9. Plaintiff Nell Matthews Mock is a 73-year-old citizen of the United States and resident of Little Rock, Arkansas. Ms. Matthews Mock is a retired biomedical researcher and has been a member of the League of Women Voters since 1993. Ms. Matthews Mock first registered to vote when she turned 18, shortly after the federal government ratified the 26th Amendment, and first registered to vote in Arkansas after she moved to the state in 1992. She later updated her registration in 2001, after she moved to her current residence. Each time she

registered in Arkansas Ms. Matthews Mock completed a new registration form. Ms. Matthews Mock is a registered voter.

10. Plaintiff Jeffrey Rust is a 69-year-old citizen of the United States and resident of Fayetteville, Arkansas. Mr. Rust has lived in Fayetteville for about 30 years and has been registered to vote in Arkansas for the past 30 years as well. He first registered approximately 50 years ago when the federal government ratified the 26th Amendment. Mr. Rust tries to vote in every election and typically voted in person until the 2020 general election, when he voted absentee due to concerns about contracting COVID-19, concerns that are especially acute because he has had lung surgery. Mr. Rust is a registered voter.

11. Bonnie Miller is President of the League of Women Voters of Arkansas and its Washington County affiliate. Plaintiff League of Women Voters of Arkansas is a nonprofit, nonpartisan membership organization with 323 dues-paying members. The League's mission is to expand and protect voting rights, empower voters, and defend democracy through education and advocacy. In furtherance of its mission, the League educates citizens about their voting rights and the electoral process. The League has a diverse membership

including African-American and Latinx members. Plaintiffs Dortha Jeffers Dunlap, Dr. Patsy Watkins, and Nell Matthews Mock are members of the League.

12. Lesley Mireya Reith testified on behalf of organizational plaintiff Arkansas United. Trial Testimony of Mireya Reith on March 16, 2022 (“Reith Testimony”). Arkansas United is a non-profit organization located in Springdale, Arkansas. Ms. Reith is Arkansas United’s founder and Executive Director and has served in this capacity since 2012. Her duties include fundraising and managing staff at Arkansas United’s offices throughout the state. Arkansas United employs 13 individuals who work on a full or part-time basis. Their duties include reaching Arkansas United’s programmatic goals and coordinating its activities. Arkansas United’s mission is to empower immigrants and their communities to be agents of change. Arkansas United’s membership is approximately 80% Latinx and 20% Asian and Pacific Islander, African American, and Caucasian. Approximately 90% of its members are first- or second-generation immigrants. Arkansas United’s mission includes providing services to Arkansas’s immigrant population such as advocacy, promoting civic engagement, and connecting immigrants with services so they can become better



integrated with their community. Arkansas United operates civic engagement programs throughout Arkansas that include voter registration drives, get-out-the-vote programs, and voter-support programs.

13. Each of the Voter Plaintiffs (Dortha Jeffus Dunlap, Nell Matthews Mock, Dr. Patsy Watkins, and Jeffrey Rust) has standing to sue because each is a citizen of the United States, resident of Arkansas, over the age of eighteen (18), and a registered voter whose right to vote is affected by Acts 249, 728, 736, and 973. The Voter Plaintiffs have standing to challenge voting-related laws “by virtue of their status as registered voters; nothing more is required.” *Martin v. Haas*, 2018 Ark. 283, at 8, 556 S.W.3d 509, 515).

14. The Organizational Plaintiffs (League of Women Voters of Arkansas and Arkansas United) have standing to sue. Organizational Plaintiffs will suffer harm directly. Due to their respective missions, the Organizational Plaintiffs will be forced to expend energies and resources to ameliorate the negative effects of Acts 249, 728, 736, and 973 (the Challenged Provisions). The Challenged Provisions frustrate their missions. Act 728 places members of the Organizational Plaintiffs at the risk of criminal prosecution for

engaging in conduct – such as publicly handing out bottles of water to persons waiting to vote within 100 feet of the primary exterior entrance of a polling location – when that conduct is not prohibited by any law and is protected by the Arkansas Constitution and the Constitution of the United States.

15. Plaintiffs met their burden of proof by a preponderance of the evidence that (1) all four Challenged Provisions (Acts 736, 973, 249, and 728) violate the Free and Equal Elections Clause, Ark. Const. art. 2 § 3, and the Equal Protection Clause, Ark. Const. art. 2 § 3; (2) Acts 736 and 973 violate the Voter 2 Qualifications Clause, Ark. Const. art. 2 § 1; (3) Act 249 violates Section 19 of Amendment 51; and (4) Act 728 violates the rights to freedom of speech and assembly in the Arkansas Constitution, Ark. Const. art. 2 § 4; Ark. Const. art. 2 § 6.

### **STANDARD OF REVIEW**

Plaintiffs allege that four measures enacted by the Arkansas General Assembly following the 2020 general election (Acts 249, 728, 736, and 973) violate the following provisions in the Arkansas Constitution: the Arkansas Voter Qualifications Clause; the Arkansas Right to Speech and Assembly Clauses; Amendment 51's germaneness requirement (see, *Martin v. Haas*, 2018 Ark. 283, 556 S.W.3d 509; the Arkansas Free and

Equal Elections Clause; and the Arkansas Equal Protection Clause.

Defendants argue that the Court should deny Plaintiffs challenges to the challenged measures and assert that each measure is rationally related to a legitimate exercise of legislative power vested in the Arkansas General Assembly (the “rational basis” standard). Thus, Defendants contend that the Court should analyze the challenged measures based on the *Anderson-Burdick* test that federal courts apply when evaluating election-related challenges [see, *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992)].

*Anderson v. Celebrezze* involved Rep. John Anderson’s effort to get on the ballot in the 1980 presidential election. Ohio had a rule that required independent candidates, like Anderson, to file in March for the November general election. The U.S. Supreme Court held that this filing deadline was excessively early, violating the First and 14th Amendments.

*Burdick v. Takushi* involved Hawaii’s prohibition against write-in voting. The Supreme Court upheld that prohibition as a reasonable regulation in the state’s effort to winnow the field of candidates down to a single winner, based on the observation that any candidate had the opportunity to participate in Hawaii’s “open primary” process, and that

being in the primary gave a candidate a fair opportunity to get onto the general election ballot.

In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the Supreme Court of the United States was presented with a dispute that resembles the challenges Plaintiffs make in this case. *Crawford* involved a constitutional challenge to an Indiana statute that required persons voting in-person to present government-issued photo identification. After the United States Court of Appeals for the Seventh Circuit affirmed a federal district court decision which granted summary judgment to supporters of the challenged law, opponents of the law sought relief in the United States Supreme Court. The Supreme Court affirmed the lower decisions, but no more than three justices agreed on the standard of review.

Defendants' reliance on the *Anderson-Burdick* "balancing test" approach that was considered but not embraced by a majority of the Supreme Court of the United States in *Crawford v. Marion County Election Board* is unpersuasive. First and foremost, aside from the fact that a majority of the Supreme Court of the United States has never declared the *Anderson-Burdick* "balancing test" as the standard for reviewing election-related challenges under the federal Constitution, the Arkansas Supreme Court has never adopted the *Anderson-Burdick* "balancing test" as the

standard of reviewing the constitutionality of conduct that allegedly violates provisions of the Arkansas Constitution. On the contrary, the Arkansas Supreme Court has “remained steadfast in its adherence to the strict interpretation of the requisite voter qualifications articulated in the Arkansas Constitution.” *Martin v. Kohls*, 2014 Ark. 427, 444 S.W.3d 844.

As far back as 1865, the law in Arkansas has been clear that the “legislature cannot under color of regulating the manner of holding elections which to some extent that body has a right to do, impose such restrictions as will have the effect to take away the right to vote as secured by the constitution.” See, *Rison v. Farr*, 24 Ark. 161 (1865). Almost a century later, our supreme court in *Faubus v. Miles*, 237 Ark. 957, 377 S.W.2d 601 (1964) overturned as unconstitutional legislation passed by the Arkansas General Assembly that purported to substitute a “free” poll tax (for voter registration purposes) in lieu of the poll tax required by Amendment 8 to the Arkansas Constitution, which required that voters “shall exhibit a poll tax receipt or other evidence that they have *paid* their poll tax...” (Emphasis added). *Id.* At 963, 377 S.W.2d at 604.

More recently, the Arkansas Supreme Court emphasized that “[w]hen a statute infringes upon a fundamental right,” it is subject to strict scrutiny and “cannot survive unless ‘a compelling state interest is advanced by the

statute and the statute is the least restrictive method available to carry out [the] state interest.” *Jegley v. Picado*, 349 Ark. 600, 632, 80 S.W.3d 332, 350 (2002) (quoting *Thompson v. Ark. Soc. Servs.*, 282 Ark. 369, 374, 669 S.W.2d 878, 880 (1984)). In addition, when an equal protection challenge brought under Article 2, Section 3 of the Arkansas Constitution implicates a “suspect classification”—such as a classification based on race—it “warrant[s] strict scrutiny.” *Howton v. State*, 2021 Ark. App. 86, at 7, 619 S.W.3d 29, 35 (2021).

Defendants acknowledge that voting is a fundamental right. Hence, the Court must apply what has been clear law on this subject for generations. The Constitution of the United States protects the right of all qualified citizens to vote in state and federal elections. *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031 (1941). As was stated in *Classic*, “Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted...” 313 U.S., at 315, 61 S.Ct., at 1037.

The right of suffrage is a fundamental right in a free and democratic society. Especially since the right to exercise the voting franchise in a free and democratic society is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be

carefully and meticulously scrutinized. *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362 (1964). The Supreme Court of the United States made it clear generations ago that “fencing” out from the voting franchise a sector of the population *because of the way they may vote* is constitutionally impermissible. *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995 (1972); *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775 (1965).

The Court holds that Acts 249, 728, 736, and 973 must be analyzed according to the strict scrutiny standard of review that has been the established judicial standard for testing the validity of governmental measures that infringe on fundamental rights. The settled conviction that the right to vote is fundamental and that alleged infringement “must be carefully and meticulously scrutinized” dictates the conclusion that the *Anderson-Burdick* “balancing test” urged by Defendants is inappropriate for assessing the constitutionality of Acts 249, 728, 736, and 973. Rather, each challenged enactment must be subjected to strict scrutiny review to determine (1) whether it advances a compelling governmental interest, and if so, (2) whether the enactment is the least restrictive infringement on the fundamental right to vote and have one’s vote counted.

## **ANALYSIS OF THE PROOF**

Defendants argue that Acts 249, 728, 736, and 973 were enacted to advance the compelling governmental interests of protecting the integrity of Arkansas elections by preventing fraudulent voting and to promote public confidence in election security. Plaintiffs do not dispute that preventing voter fraud and promoting public confidence in election security are compelling governmental interests. Thus, the Court evaluated the evidence produced at trial surrounding fraudulent in-person, fraudulent absentee voting in Arkansas, the concerns which Defendants assert as motivating factors for the challenged enactments.

A review of the history surrounding voter ID litigation is in order. In 1964, Amendment 51 to the Arkansas Constitution was proposed by initiative petition and approved by Arkansas voters at the general election to abolish the poll tax and establish a comprehensive regulatory scheme for voter registration.

On March 19, 2013, both houses of the Arkansas General Assembly passed Act 595, which required Arkansans to provide “proof of identity” when voting at the polls. Section 1 of Act 595 required proof of identity in the form of a voter-identification card or a document or identification card showing the voter’s name and photo that was issued by the United States,



the State of Arkansas, or an accredited postsecondary education institution in Arkansas with an expiration date. Then Governor Mike Beebe vetoed Act 595 because he questioned its constitutionality. In his letter to the Arkansas Senate, Governor Beebe wrote that Act 595 was “an expensive solution in search of a problem” and was “an unnecessary measure that would negatively impact one of our most precious rights as citizens.” After the veto was overridden by the Arkansas Senate and the Arkansas House of Representatives, a lawsuit was filed seeking declaratory and injunctive relief which challenged the sections of Act 595 that imposed the photo ID requirement.

Article 3, Section 1 of the Arkansas Constitution states:

Except as otherwise provided by this Constitution, any person may vote who is:

- (1) A citizen of the United States;
- (2) A resident of the State of Arkansas;
- (3) At least eighteen years of age; and
- (4) Lawfully registered to vote in the election [As amended by Const. Amend. 85.]

Ark. Const. Article 3, § 1 (Supp. 2013).

In *Martin v. Kohls*, 2014 Ark. 427, 444 S.W.3d 844, the Arkansas Supreme Court held that Act 595 of 2013, which required voters to show proof of identity in the form of a photo identification, was facially unconstitutional because it imposed an additional requirement to vote that

“falls outside the ambit of article 3, section 1, of the Arkansas Constitution. *Martin*, 2014 Ark. 427, at 15, 444 S.W.3d at 852-53.

Following that decision, the Arkansas General Assembly passed Act 633 of 2017. Act 633 required Arkansas voters to provide verification of voter registration in the form of a document or identification card that shows the person’s name and photograph, issued by the federal or state government or an accredited postsecondary educational institution in Arkansas, and is no more than four years expired if displaying an expiration date. An in-person voter who does not present to the election official compliant identification may cast a provisional ballot, not a regular ballot.

Under Act 633, the provisional ballot of a person seeking to vote without the compliant photo identification can be counted in either of two ways. One way is by completing a sworn statement at the polling site, under penalty of perjury, stating that the voter is registered to vote in Arkansas and that he or she is the person registered to vote (the “voter identity affirmation”). Another way to have the provisional ballot counted is to present a compliant form of photographic identification to the county board of election commissioners or the county clerk by 12:00 noon on the Monday following the election. If the voter identity affirmation is signed at the polling site or if the voter later presents compliant photo identification as

described above, the provisional ballot shall be counted if the county board of election commissioners “does not determine that the provisional ballot is invalid and should not be counted on other grounds.” *Id.* § 2, 2017 Ark. Acts at 3073.

In *Martin v. Haas*, 2018 Ark. 283, 556 S.W.3d 509, the plaintiff filed a declaratory judgment complaint seeking a court ruling that Act 633 of 2017 was unconstitutional and to enjoin its enforcement. The plaintiff contended that the photo identification requirement and related voter identify affirmation requirements violated Article 3, Section 2 of the Arkansas Constitution because it constituted an impairment on the ability of qualified Arkansas voters to cast valid ballots. After Circuit Judge Alice Gray upheld the facial unconstitutionality challenge to Act 633 and entered a preliminary injunction order prohibiting and enjoining the Secretary of State and State Board of Election Commissioners from enforcing its requirements, the Arkansas Supreme Court granted a stay of the preliminary injunction ahead of the May 2018 preferential-primary election and later reversed Judge Gray’s judgment that Act 633 was facially unconstitutional. In doing so, the Arkansas Supreme Court held that the Secretary of State and State Board of Election Commissioners that the Arkansas General Assembly had the power to enact Act 633 as a measure that was germane to Amendment 51

to the Arkansas Constitution as part of the comprehensive regulatory scheme for conducting elections.

### **Act 249 Proof**

Following the November 2020 general election, The Arkansas General Assembly passed Act 249 in March 2021. Act 249 eliminated the provision in Act 633 that allowed a voter who failed to produce a compliant photo ID when voting in person to sign an affidavit, under penalty of perjury, attesting to his or her identity, residence, and qualification to vote. Consequently, a voter must now personally present a compliant form of photographic identification to the county board of election commissioners or the county clerk by 12:00 noon on the Monday following the election. Unless the voter does so, the provisional ballot will not be counted. Plaintiffs allege that Act 249 impairs their right to vote.

### **Dortha Jeffus Dunlap**

Plaintiff Dortha Jeffus Dunlap is an eighty-five years old voter. Ms. Dunlap testified that she mailed her absentee ballot for the November 2020 general election and would prefer to drop off her absentee ballot in the future. Ms. Dunlap testified that due to her age, the fact that she rarely drives, and primarily relies on her family to get around, she is unsure if she will renew her Arkansas driver's license (one of the documents that will

satisfy the photo ID requirement) when it expires in August of 2025. Ms. Dunlap is concerned Act 249 will burden her right to vote because four years after her license expires, she will not have the requisite form of identification to cast a ballot. Although the state offers a free voter ID, Ms. Dunlap testified that her mobility issues will make it difficult for her to get one because she will need to be taken to be photographed to obtain a photo ID when her current driver's license expires because Act 249 eliminated the affidavit exception to the photo ID requirement.

**Bonnie Miller**

Bonnie Miller, President of the League of Women Voters of Arkansas, testified that the League is concerned about how Act 249 will affect its members and the public. Some League members live in rural areas, and some do not have driver's licenses. Id. Without the option to complete an affidavit, members who live in remote rural areas will have to incur additional time and transportation costs if they do not bring their ID to the polling location. Id. And if members do not have one of the accepted forms of ID, they will have to incur even more time and transportation costs to obtain one. Members who vote by absentee ballot will also be affected by Act 249 because they, too, now lack the option to complete an affidavit in lieu of sending a copy of their qualifying ID with their absentee ballot, an

option members may have used in the past. Members who must return a copy will incur additional costs associated with locating and using a photocopier machine to make and return a copy of their ID with their ballot. In the past, the League has provided photocopying and printing services and has also provided services transporting members. If resources permit, the League may provide these services to assist members in obtaining copies of their IDs or in traveling to obtain a qualifying ID; however, doing so will be resource-intensive and will put additional strain on the League's already limited budget and resources.

### **Mireya Reith**

Lesley Mireya Reith testified on behalf of Plaintiff Arkansas United, a non-profit group whose mission involves immigrant advocacy, education, and civic engagement. Ms. Reith testified that numerous Arkansas United members used the affidavit fail-safe provision when they voted in person during early voting or on election day because they do not have driver's licenses. The effect of Act 249 on those voters would mean they would be unable to vote until they obtained a photo ID. Many Arkansas United members do not have computers and copiers or other equipment needed to produce photo IDs. Many AU members work two or three jobs, and are unable to go to a courthouse or other location to be photographed for a

government-issued ID. Those registered voters will be disenfranchised by Act 249.

**Commissioner Susan Inman**

Commissioner Susan Inman testified that she is currently a member of the Pulaski County Election Commission, former elections official in the Arkansas Secretary of State's office during a previous administration, founded and headed a non-profit corporation to provide training to election commissioners, and that she has served as an international election observer. The Court recognized Commissioner Inman as an expert witness concerning election procedures in Arkansas, election administration, and election integrity. Commissioner Inman testified that there had been no allegations of fraudulent voting associated with the affidavit exception to the photo ID requirement for in-person voting, and that eliminating the affidavit fail-safe would result in the provisional ballots of qualified Arkansas working class voters who either do not have photo IDs or are unable to take off work and present compliant photo ID to county clerks or election commissioners by the Monday following election day.

Commissioner Inman also testified that as an election commissioner, she accepted provisional ballots from voters who signed the affirmation of eligibility prescribed under prior law (Act 633), and that she does not know

of any instance of voter fraud based on that affirmation (described by counsel for Plaintiffs as “the affidavit fail-safe”). Commissioner Inman described the burdens experienced by voters who do possess or can obtain acceptable photo ID, fail to present it while voting in person, and must return to county clerks with the compliant photo ID. That undertaking will involve significant travel (depending on the distance between where voters reside and the county seat where the clerks are located) to submit the compliant photo ID required by Act 249. According to Commissioner Inman, voters who cannot afford the time and other burdens required to trek from polling locations back to their homes, return with compliant photo ID to county clerk offices, and then return home, will likely be disenfranchised.

**Dr. Kenneth Mayer**

Dr. Kenneth Mayer from the University of Wisconsin LaFollette School of Public Affairs in Madison, Wisconsin appeared virtually. Dr. Mayer testified that Arkansas now has a “strict voter ID law” because the affidavit fail-safe was eliminated by Act 249. According to Dr. Mayer, academic literature indicate how minority, poor, and elderly voters are less likely to have photo IDs, and are more likely to be disenfranchised by strict voter ID laws. Dr. Mayer also testified that restrictive voting rules such as



Act 249's elimination of the affidavit fail-safe have an independent depressing effect on voter turnout. Arkansas has lower voter turnout than most of the rest of the United States due to the high poverty level and lower education of Arkansas voters, Dr. Mayer opined that the effect of Act 249 would further depress voter turnout in Arkansas. The Court will review Dr. Mayer's expert testimony about Act 249 and the other Challenged Provisions at length later in this opinion.

Defendants presented no evidence that contradicted the testimony from Ms. Dunlap, Ms. Reith, Ms. Miller, Commissioner Inman, and Dr. Mayer about how Act 249 would affect voters, including voter turnout. No evidence was presented that contradicted Dr. Mayer's testimony that minority, poor, and elderly voters are less likely to have photo IDs and more likely to be disenfranchised by strict voter ID laws such as Act 249.

Moreover, Defendants presented no testimony showing that the affidavit fail-safe Defendants championed in *Martin v. Kohl* when Act 633 was challenged was ineffective, meaning that Defendants produced no proof show that removal of the affidavit fail-safe through Act 249 was necessary to ensure election integrity and prevent fraudulent in-person voting. Defendants presented no evidence of voter fraud whatsoever – whether arising from the affidavit fail-safe or otherwise. Director Daniel

Shults of the defendant State Board of Election Commissioners testified that he did not know of any cases of alleged fraudulent in-person voting.

Plainly, Plaintiffs met their burden to prove that Act 249 infringes upon the right of voters who do not have a photo ID. Here, the evidence did more than preponderate in favor of Plaintiffs' challenge to Act 249. The testimony from the aforementioned voter plaintiffs concerning the burden they will face, the testimony from Ms. Reith and Ms. Miller on behalf of the Organizational Plaintiffs, the testimony by Commissioner Inman, and the expert opinion testimony from Dr. Mayer concerning the suppressive effect of eliminating the affidavit fail-safe on minority, poor, and elderly voters was uncontradicted.

Furthermore, Director Daniel Shults and Joshua Bridges (the designated representative at trial for defendant Secretary of State John Thurston) acknowledged during cross-examination that although the 2020 general election was the most successful in Arkansas history, baseless concerns and fears about voter fraud were based on social media misinformation and unsubstantiated allegations broadcast by media outlets. There was no proof that substantiated any purported concern about voter fraud. None of the 75 county clerks in Arkansas testified that the affidavit exception to the photo ID requirement created an opportunity for voter

fraud. Despite misinformation and other concerns about voter fraud that were broadcast through social media and through certain news outlets, Defendants presented no proof that in-person or absentee voter fraud occurred in Arkansas elections before Act 249 was enacted by the Arkansas General Assembly. And it is especially telling that none of the legislators who sponsored and voted for Act 249 testified to substantiate their purported concerns about election integrity and voter fraud.

The uncontradicted evidence compels the conclusion that Act 249 infringes on the fundamental right of Arkansans who are eligible and registered to vote yet lack a photo ID to vote and have their ballots counted. Rather than lessening the disadvantages faced by Arkansans who are registered voters who lack a compliant photo ID to vote and have their vote counted, the Arkansas General Assembly *disqualified* those registered voters by eliminating the affidavit fail-safe without any proof that fraudulent voting happens in Arkansas elections. It necessarily follows that Act 249 is not “narrowly tailored” to accomplish the compelling governmental interest of preventing fraudulent voting.

### **Act 728 Proof**

Act 728 amended Arkansas law concerning electioneering by adding the following provision to Ark. Code Ann. § 7-1-103(a) as follows.

(23) A person shall not enter or remain in an area within one hundred feet (100') of the primary exterior entrance to a building where voting is taking place except for a person entering or leaving a building where voting is taking place for lawful purposes.

Director Daniel Shults of the Board of Election Commissioners and Mr. Joshua Bridges of the Office of the Secretary of State testified that Act 728 was enacted out of concern about electioneering. Arkansas law defines "electioneering" at Ark. Code Ann. § 7-1-103 (a)(8)(C) as "the display of or audible dissemination of information that advocates for or against any candidate, issue, or measure on a ballot," and further states:

(ii) "Electioneering" includes without limitation the following:

- (a) Handing out, distributing, or offering to hand out or distribute campaign literature or literature regarding a candidate, issue, or measure on the ballot;
- (b) Soliciting signatures on a ballot;
- (c) Soliciting contributions for a charitable or other purpose;
- (d) Displaying a candidate's name, likeness, or logo;
- (e) Displaying a ballot measure's number, title, subject, or logo;
- (f) Displaying or dissemination of buttons, hats, pencils, pens, shirts, signs, or stickers containing electioneering information; and
- (g) Disseminating audible electioneering information.

Electioneering is a Class A misdemeanor in Arkansas punishable by up to one year in county jail and/or a fine of not more than \$2500.

Plaintiffs presented testimony through Nell Matthews Mock, Mireya Keith, Dr. Patsy Watkins, Bonnie Miller, Jeffrey Rust, Commissioner

Susan Inman, and Dr. Kenneth Mayer about the impediments Act 728 will present on voting.

**Nell Matthews Mock**

Ms. Matthews Mock testified that due to health conditions (osteoporosis and stenosis) she has difficulty standing for prolonged periods of time. Ms. Matthews Mock testified that she voted in person during the November 9, 2021 mileage election in Pulaski County and was not challenged with prolonged standing because “there was no line” due to low voter turnout for that election. However, she waited for more than an hour to vote in 2005, and testified that it would be physically hard to do so now. Ms. Matthews Mock testified that if she were faced with a long line at the polls during early or election day voting she would benefit from people providing water or other comfort measures to her while she waited to vote. And as a member of the non-partisan League of Women Voters, she was concerned about Act 728 because of the vagueness of its “lawful purpose” qualifier.

**Mireya Keith**

Mireya Keith from Arkansas United testified that Arkansas voters who are immigrants are more likely to need assistance when standing in line while waiting for in person early and election day voting. However, the

prospect of being charged with a misdemeanor while providing water or other comfort relief to persons waiting to vote concerns Arkansas United members, the majority of whom are persons from Latinx, Asian-Pacific Island, and African backgrounds.

### **Dr. Patsy Watkins**

Dr. Watkins is a registered voter who has lived in Arkansas since 1983 and in Fayetteville for the past 23 years. Dr. Watkins retired from the University of Arkansas in 2017, where she served as a professor of journalism for approximately 34 years. Dr. Watkins first registered to vote in 1969 when she turned 21, which was the first election in which she was eligible to vote. Id. She first registered to vote in Arkansas in 1983, and she last updated her voter registration more than 20 years ago, when she moved to her current residence.

Dr. Watkins has health conditions that affect her ability to vote absentee and in person under the Challenged Provisions. She has arthritis in her right hand, her dominant hand, and a kidney condition that requires she stay hydrated and drink water consistently throughout the day. For the past 10 to 12 years, Dr. Watkins has voted in person. Before then, she voted absentee on occasion because her position at the University of Arkansas required her to travel during election season.

Dr. Watkins voted in the November 2020 general election. Dr. Watkins Testimony. She heard that early voting turnout had been high and anticipated election day turnout would be even higher. She voted in person at the Naturals' baseball stadium during early voting on a weekday around 2:30 or 3:00 p.m. She testified that she specifically chose that day and time to avoid long lines because of her medical conditions. Nevertheless, when Dr. Watkins arrived to vote, she noticed the line extended outside the stadium entrance. At first, Dr. Watkins thought the line looked reasonable and waited outside in the heat for approximately 30 minutes. She found it difficult to wait and considered leaving, but she stayed because she did not think the line would be different on other days. The line was even longer once she got inside the stadium. She had not anticipated having to wait in line or outside for so long. The long wait made Dr. Watkins uncomfortable and caused her severe back pain. She did not have water to keep her hydrated while waiting in the heat. No one was offering water to voters waiting in line. Had someone offered her water, she would have accepted it because of the heat and especially her kidney condition.

Dr. Watkins believes Act 728 will burden her right to vote because it is vague. She does not understand what "lawful purpose" means and is unsure whether a friend would be allowed to help her wait in line. She is

also not sure whether volunteers could offer her water or snacks while she's waiting in line. Given her health conditions, assistance would be essential for Dr. Watkins to endure a line like the one she waited in to vote in the 2020 general election without suffering pain and discomfort. She understands that Arkansas law allows disabled individuals to move to the front of a line at a polling place but is unsure how she would prove that and whether she can rely on receiving an accommodation in the future.

**Bonnie Miller**

Ms. Miller testified that the League of Women Voters of Arkansas is likewise concerned about how Act 728 will affect its activities. Expanding voter access, ensuring that all eligible citizens are fully enfranchised and able to exercise their right to vote are all central to the League's mission. Act 728 is antithetical to the League's mission and impairs the League's ability to support voters or fulfill its mission.

The League accomplishes its mission through various activities and get-out-the-vote programs, voter registration drives, and voter support efforts before, on, and after election day. In this respect, election day is the League's most important day because it spends substantial time, effort, and resources helping Arkansans ensure their ballots are properly cast and canvassed.



League volunteers offer a wide range of assistance including transportation assistance, physical assistance with waiting in line, and helping voters figure out how to navigate the polling location. The League does not organize polling place volunteer efforts on election day, but it encourages its members to engage in these activities and the League's members do so in the League's name. To provide this level of meaningful assistance, League members must operate within the 100-foot perimeter because some forms of voter support, like handing out water or snacks or assisting voters in line, require the volunteers to be in close proximity to voters.

As a result, the League and its members' election day activities will be affected by Act 728. According to Ms. Miller, the League is unlikely to encourage its members to engage in these activities if Act 728 remains in effect because it is unclear who is permitted in the 100-foot zone, and the League does not want its members to risk arrest, criminal prosecution, and the risk of Act 728's criminal penalties (one year in county jail and/or fine of up to \$2500) if these polling place support activities are not permitted.

**Jeffrey Rust**

Plaintiff Jeffrey Rust is a 69-year-old resident of Fayetteville, Arkansas whose video deposition was presented at trial on March 15, 2022

(“Rust Testimony”). Mr. Rust has lived in Fayetteville for about 30 years, has been registered to vote in Arkansas for the past 30 years, and first registered to vote approximately 50 years ago when the federal government ratified the 26th Amendment. Mr. Rust tries to vote in every election and typically voted in person until the 2020 general election, when he voted absentee due to concerns about contracting COVID-19, concerns that are especially acute because he has had lung surgery. Mr. Rust found voting absentee easier and more comfortable and would prefer to continue to vote absentee in the future. However, Mr. Rust most recently voted in the 2021 sales tax extension and voted in person because he had not applied to vote absentee. Mr. Rust testified that he is concerned that Act 728 will burden his right to vote because he relies on a cane to walk and cannot stand for long periods of time without assistance. He is unsure whether his wife or daughter would be able to assist him if he votes in person and has to wait in line, and expressed concern that under Act 728, he would be forced to leave a line in which he physically cannot wait without their help.

**Commissioner Susan Inman**

Commissioner Inman explained that Act 728 is unnecessary because a separate law against electioneering is already being enforced by

poll workers and election officials. To comply with that law, poll workers mark the 100-foot zone against electioneering before polling locations are opened. Poll workers are vigilant to ensure that no one is coming within that 100- foot radius to engage in electioneering. When poll workers observe electioneering within the 100-foot zone, they ask offenders to stop, and if offenders refuse to do so or otherwise persist in electioneering poll workers summon law enforcement officers for assistance.

Commissioner Inman has assisted and encouraged family and friends to vote, including encouraging neighbors and friends waiting in line at the polls. Under Act 728, she is unsure whether she will be able to continue to engage in those activities. She understands the 100-foot area to be a zone where people are not bothered by campaigning but is uncertain whether she will be in violation if she stops within the zone for any reason other than entering or exiting the polling location.

**Dr. Kenneth Mayer**

Dr. Kenneth Mayer testified virtually as an expert on behalf of the Plaintiffs. Dr. Mayer is an expert in political science, statistical and quantitative analysis of voting, voter behavior, voter turnout, and election administration. He is a full professor in the political science department at the University of Wisconsin-Madison, where he has been on the faculty

since August 1989. Before rising to that position, Dr. Mayer earned his Bachelor of Arts in political administration with a minor in applied mathematics from the University of California, San Diego. He then earned both his Master of Arts and Ph.D. in political science from Yale University.

In the last 10 years alone, Dr. Mayer has authored and published publications in at least ten peer-reviewed journals and five law reviews across the nation and abroad. His work has been cited by the U.S. Government Accountability Office and legislative research offices of Connecticut and Wisconsin. He has been retained by the U.S. Department of Justice to review and analyze data and methods of election administration in Florida, and the Wisconsin Government Accountability Board to review their compliance with federal mandates and reporting systems. In the past nine years alone, he has been retained as an expert in no less than 20 state and federal proceedings related to elections administration, absentee ballots, or other similarly related subjects. Dr. Mayer's expert opinions have never been excluded by any court whether scrutinized under Daubert or any other standard. And courts have in fact cited his expert opinion in their decisions, finding they were reliable and persuasive.

Plaintiffs retained Dr. Mayer to opine on the effects of the Challenged Provisions. Dr. Mayer opined that the Challenged Provisions will “impose direct and indirect costs on voters and force voters to overcome specific burdens to cast their ballots.” These burdens are very likely to decrease turnout, make it harder to vote, and disenfranchise Arkansas’s most vulnerable subpopulations. Moreover, the Challenged Provisions will not produce any material contributions to elections administration, security, or integrity. Because the Challenged Provisions impose costs and burdens on voters that will reduce turnout and provide no benefit, they are “administrative deadweight,” a public administration term for requirements that create additional administrative costs and hurdles without any benefit. In reaching his opinion, Dr. Mayer relied on a collection of data and academic literature and analyzed the Challenged Provisions using “the cost of voting framework,” which is the foremost political science model for understanding how voting behavior and turnout is affected by changes in administrative practices.

Dr. Mayer testified that “the cost of voting framework” has been empirically tested for the past 60-70 years. It is considered canonical among experts and academics as the starting point for almost every analysis of voter turnout and the effect of administrative practices on

turnout. The “cost of voting framework” assesses the costs and benefits of the voting process and looks at how those costs impact voters.

According to Dr. Mayer, the “cost of voting framework” shows that socioeconomic status is strongly correlated with voter turnout. Lower educational attainment and income are directly related to lower voter turnout. Higher educational attainment and income are directly related to higher voter turnout. Voters with higher educational attainment and income have a better perception of the benefit of voting, pay closer attention because they have an easier time understanding and overcoming the administrative burdens, and consequently, are more likely to overcome the costs of voting.

Dr. Mayer testified that before the Challenged Provisions were enacted, Arkansas already had one of the strictest, if not the strictest, voting regimes in the United States. The combination of a 30-day cut-off for registration, strict absentee voting rules, lack of online voter registration, lack of online absentee applications, and non-strict voter ID laws working in concert have depressed voter turnout so much that Arkansas has among the lowest turnout of any state, both overall and among African-American populations. State level turnout from 2008 to 2020 shows that Arkansas has been in the bottom five states every year except 2014, an anomalous

year that saw the lowest turnout nationwide since 1942. Arkansas has the lowest maximum turnout, 56.1% in 2020, of any state in any year between 2008 and 2020.

Dr. Mayer testified that the depressive effects of Arkansas's strict voting regime are most severely felt by Arkansas's most vulnerable subpopulations. While turnout is generally low across the state, turnout among African Americans shows just how severely Arkansas's voting regime impacts African Americans. In 2008 and 2010 Arkansas had the lowest turnout among African Americans in the entire nation and in the years since has never risen above 60%.

Dr. Mayer testified that the statistical relationship between poverty and voter turnout in Arkansas has remained the same since 2012—as poverty levels increase, voter turnout decreases. Poverty levels even depress voter turnout among registrants who have already overcome the initial administrative burden of registration. In 2020, the percentage of registrants who voted, 66.9%, was twenty-five percentage points behind the national figure of 91.9%.

In the opinion of Dr. Mayer, Arkansas has a “restrictive voting regime” that has had a depressive effect on voter turnout and kept Arkansas as one of the lowest-turnout states in the nation for years. According to Dr. Mayer,

the data also show that the costs and burdens of voting are not borne equally, but fall disproportionately on the minority and low-income communities, and on those with lower educational attainment.

Dr. Mayer testified that prior to the enactment of the Challenged Provisions, Arkansas already had among the highest absentee ballot rejection rates in the country. In 2020, Arkansas had the highest absentee ballot rejection rate, one that was more than ten times higher than the national average.

Dr. Mayer believes the Challenged Provisions, whether taken individually or collectively, will disenfranchise Arkansas voters. By removing the Affidavit Fail-Safe option, Act 249 transformed Arkansas into what the National Conference of State Legislatures describes as a “strict” voter ID state. A state earns the “strict” designation if its laws require only limited forms of ID with no exceptions. Act 249’s elimination of the Affidavit Fail-Safe removes the method by which more than 1,600 voters in Pulaski County alone voted in 2020. Although Dr. Mayer did not receive data from other counties, he is certain statewide usage exceeds what he observed in Pulaski County. Testimony by Mireya Reith from Arkansas United that members of the Fayetteville community had used the failsafe in recent elections corroborates this opinion.



Dr. Mayer testified that Act 249 also removes the Affidavit Fail-Safe for absentee voters who submit their ballots by mail, but it does not specify what exactly such voters must do to comply. Presumably, voters are expected to include a photocopy of their ID in the envelope with their ballot. But it is unclear that this is sufficient from reading the text of the statute. According to Dr. Mayer, including a photocopy of their ID in the envelope submitted by absentee voters who mail their ballots would prove extremely difficult for the voters in the approximately 14% of Arkansas households who do not have a computer and likely also lack access to a photocopier or printer. Act 249 will have an especially adverse impact on lower socioeconomic, minority, elderly, and younger voters who are less likely to possess the requisite forms of ID. Consequently, the burdens will be most severely felt by those subpopulations and increase the likelihood they are unfairly and erroneously disenfranchised as compared to their fellow citizens.

Act 973 will have a depressive effect for multiple reasons. The various absentee ballot deadlines increase the informational burdens on voters and the potential for confusion. Commissioner Inman's testimony corroborates this as she felt voters who had cast their ballots under the new deadline were more likely to be confused by the new change and

potentially miss the new deadline. Act 973 also increases the likelihood that voters who originally intended to mail their absentee ballots but fear they will miss the deadline because of mail delays, would be turned away if they try to return their ballot in person during the three-day window. Since 2016, more than 1,222 Arkansas voters returned their absentee ballots in person during the three-day window that Act 973 eliminates. Arkansas already had a very high absentee ballot rejection rate compared to other states, and Act 973 will lead to even more rejections and voter disenfranchisement.

Dr. Mayer testified that Act 728 will disproportionately impair and disenfranchise minority voters who are more likely to wait in lines longer than their white counterparts. Minority voters across the nation were more likely to wait at least 30 minutes in line to vote and on average wait nearly 30% longer to vote than their white counterparts. Act 728's lack of clarity creates the additional risk of unequal application of discretion. Given the criminal penalties of Act 728, this is a particularly concerning prospect because minority voters are more likely to face long lines where they will require assistance to endure the wait.

Dr. Mayer's analysis of Act 736 corroborates Dr. Linton Mohammed's expert opinion testimony regarding the unreliability of the signature matching process for verifying voters' identification. The academic literature

shows that signature matching is an inherently error-prone process that relies on subjective standards, election offices use varying methods and standards even when considerable resources are devoted to training, and error rates resulting in improper rejections are high. In a Georgia study that reviewed absentee ballots rejected for mismatched signatures which were subsequently cured to illustrate this problem, the rejection error rates were 32.4% for the 2020 general election and 60.4% for the January 2021 runoff elections that followed.

Dr. Mayer anticipates there to be similar problems in Arkansas where officials employ similarly inconsistent and subjective standards. To confirm this, Dr. Mayer analyzed the signature rejection rates for absentee ballots in Arkansas since data was not available for absentee ballot application rejection rates. Of the counties that did report their data, rejection rates varied widely from county to county, reflecting the inconsistent standards for signature comparison from county to county. Dr. Mayer testified that Act 736 takes the subjective and inherently error-prone signature matching process already in place and exacerbates its effects. This will not only increase overall rejection rates, but also erroneous rejection rates.

Dr. Mayer opined that Act 736 will not enhance election security or integrity. He testified that voter fraud is “vanishingly rare” nationally and in

Arkansas. Since 2002, there have been only four instances of confirmed election fraud in Arkansas. There is no material voter fraud in Arkansas and nothing indicating that Arkansas elections are not secure. Moreover, there have been no instances of fraud or misconduct associated with (1) the Affidavit Fail-Safe eliminated by Act 249; (2) absentee ballots being turned in in-person the day before election day; (3) absentee ballot application signature matching, or (4); people handing out water or snacks to voters waiting in line.

Dr. Mayer's expert testimony was not contradicted.

### **Act 736 Proof**

Act 736 requires that a voter's absentee ballot application signature be "similar" to the one on the voter registration card. Prior law authorized county clerks to compare the signature on an absentee ballot application to voter "records," Act 736 requires that the signature on applications for absentee ballots be similar to the signature on the "voter registration card."

### **Nell Matthews Mock**

Ms. Matthews Mock suffers from osteoporosis, stenosis, and scoliosis, as well as carpal tunnel, arthritis, and bursa in her hands. To alleviate the symptoms, she has had to undergo carpal tunnel release surgery. She also receives steroid injections, the effectiveness of which

wears off over time. Even with treatment, these conditions make Ms. Matthew Mock's hands stiff, swollen, and difficult to use. This impacts her writing and the fine motor control she needs to write by hand or even just sign a document. The onset and extent of Ms. Matthews Mock's symptoms are unpredictable, and she cannot always control or manage them. Her symptoms can last for hours; if she does have to write or sign documents during these bouts of pain, her signature does not look the same.

Depending upon the severity of her symptoms, her signature changes from one day to the next. These changes are not intentional and not under Ms. Matthews Mock's control.

Ms. Matthews Mock has voted absentee three times. Id. She most recently voted absentee in the November 2020 general election and a consequent runoff, to avoid long lines. She plans to vote in the upcoming elections in May 2022 primary election, but her decision whether to vote in person or absentee in future elections will depend on the length of the lines, the state of the COVID-19 pandemic, and her health.

Ms. Matthews Mock believes the Challenged Provisions will impair or forfeit her right to vote. More specifically, she believes Act 736 will make it more likely that her absentee ballot application will be rejected because she did not suffer from arthritis (and the resulting effects of that condition on her

signature) when she registered to vote in 1992 and when she updated her registration in 2001.

Moreover, during the pendency of this lawsuit, Ms. Matthews Mock submitted a public records request to Pulaski County requesting her voter registration application and any absentee ballot applications. Pulaski County did not produce a single voter registration application for Ms. Matthews Mock, indicating that Pulaski County does not have the signature from her any of her voter registration applications on file. Ms. Matthews Mock was never notified that her signature was missing.

Because Pulaski County does not have a signature from Ms. Matthews Mock's voter registration form on file, it does not have the only signature comparator Act 736 allows for her absentee ballot applications under Act 736. See Ark. Code Ann. § 7-5-404. Moreover, the signatures that Pulaski County does have on file for Ms. Matthews Mock vary greatly. Pulaski County produced records of Ms. Matthews Mock's signatures from her June 2020 absentee ballot application, as well as from pollbooks that she signed for elections on November 9, 2021, November 2, 2021, and August 29, 2005. Each of these signatures in her voter record appear different from the signature on her June 2020 absentee ballot application. In fact, her signatures created on November 9, 2021, and November 2,

2021 – just one week apart from one another – appear different. Ms.

Matthew Mock admitted that she can update her signature, but testified that there is no guarantee she will not be suffering from symptoms of her health conditions that affect her signature when she does so—or when she later applies for an absentee ballot.

### **Jeffrey Rust**

Mr. Rust suffers from several medical conditions, including macular degeneration and tremors, that affect his ability to drive, read and write, and stand for long periods of time— and ultimately his ability to vote. *Id.* If he votes absentee in the future, it will be because of his illnesses and physical disabilities.

Mr. Rust's vision is poor and continues to deteriorate. He cannot read the newspaper without holding it close to his face in good light. Mr. Rust must receive injections in his right eye every four to six weeks as treatment for his macular degeneration. Mr. Rust's hand tremors are particularly acute when he signs his name, and as a result, he believes his signature is different every time he signs his name. In fact, on a vacation in Mexico a merchant refused to cash Mr. Rust's traveler's check because his signatures were so significantly different.

Mr. Rust believes his ballot will be similarly rejected under Act 736 because his signature varies so significantly. When questioned during cross examination about his concern about the risk of his application for absentee ballot being rejected for that reason, Mr. Rust responded, “My signature is my signature.”

### **Dr. Patsy Watkins**

Dr. Watkins testified that the Challenged Provisions will impair or forfeit her right to vote. Specifically, she is concerned that under Act 736 election officials will reject her absentee ballot application if the officials determine that her signature is not similar to the signature on her registration application from 1983.

Dr. Watkins never had an absentee ballot application rejected prior to the enactment of Act 736, but she recognizes that a lot is required of people who must do the signature comparisons and she is concerned that they are not trained in forensic signature comparison analysis and is concerned that an erroneous rejection will affect her right to vote.

Dr. Watkins knows she can update her signature by submitting a new voter registration application, but she does not believe this will address the concern because her signature is prone to change—especially because of



her health condition. She finds it unreasonable that Act 736 could require her to update her signature before every election.

**Bonnie Miller**

Ms. Miller testified that the League conducts monthly training sessions to teach members how to assist other people in registering to vote. Ms. Miller leads and teaches these training sessions via a PowerPoint presentation. Ms. Miller tries to address questions from attendees regarding other topics when she can, but because the training sessions are only scheduled for an hour, doing so can take time away from training attendees how to help other people register to vote. Ms. Miller has been asked questions about each of the Challenged Provisions by attendees at the monthly training sessions. Most often she receives questions regarding how the Challenged Provisions work. Many of the League's members and other trainees express "fear or confusion" about what the Challenged Provisions mean and how the Challenged Provisions will change their ability to vote.

Ms. Miller testified that she receives the most questions about Act 736. Many of the League's members are older and fear that their signatures will not match their registration applications. Most of the older members registered to vote many years ago and have since developed

medical conditions that affect their signature sporadically. Ms. Miller shares these concerns because she suffers from a degenerative neurological disease that attacks her motor skills and her ability to sign documents.

The League is concerned about how Act 736 will affect its members, especially given that many of the League's members are older and have health conditions that impact their signatures. The League is worried that their members will not be able to obtain absentee ballots because the signatures on their voter registration forms will be deemed not similar to the signatures on their absentee ballot applications. Although Ms. Miller is unaware of any members who have reported having their absentee ballot applications rejected due to their signatures in the past, Ms. Miller and the League remain concerned that erroneous rejections will occur under Act 736 because now clerks can use only one point of comparison rather than the entire record of signatures.

Despite the cure provision in Act 736, Ms. Miller believes that the additional steps voters must take within such a short window of time will force members to forego the opportunity to cure. Many members, like Ms. Dunlap, have transportation and mobility limitations that make the cure difficult.

Ms. Miller testified that she does not believe that the ability for members to update the signatures on their voter registration form by reregistering will help avoid the negative effects of Act 736. Registering to vote in Arkansas is burdensome; it cannot be done online, but must be done in person. Furthermore, telling the public and its members that they can update their signature by reregistering to vote to attempt to avoid erroneous rejections under Act 736 is likely to cut against the League's mission of registering voters and expanding the franchise because individuals will choose not to register or vote at all if they think they need to take additional steps such as reregistering each year.

### **Commissioner Susan Inman**

Dr. Inman testified that she first served as an Election Coordinator for Pulaski County Election Commission from 1994 to 2000. She next served in election positions under then-Secretary of State Sharon Priest from 2000 to 2003, including as Director of Elections. She returned to Pulaski County Election Commission as Election Coordinator from 2003 until her retirement in 2009. She has been a member of the League of Women Voters for the past 25 years.

After retiring, Commissioner Inman formed a nonprofit to facilitate communication between election officials across the state, including

specifically the State Board of Election Commissioners and the County Boards of Elections Commissioners, with the goal of helping them share and improve best practices to better serve the public. Commissioner Inman's nonprofit was the only organization that provided for this type of collaboration amongst county officials. No other organization has brought all the state's election officials together since the organization ended in July 2016. While running her nonprofit, Commissioner Inman ran for Secretary of State in 2014 against Mark Martin. She ran again in 2018 against the current Secretary, John Thurston.

In addition to her positions within Arkansas, Commissioner Inman has gained extensive experience serving as an international election observer. Since 1997, Commissioner Inman has monitored elections in Yugoslavia, republics of the former USSR, Russia, and two presidential elections in Ukraine. A considerable amount of training and experience is required to become an election observer. To even be considered for the position, one must be considered an expert in the field of elections administration, and Commissioner Inman has been considered an expert in the field since at least 1997. While overseas, Commissioner Inman was responsible for observing poll sites, opening polls, transporting election materials,

monitoring the tabulation and counting of ballots, and reporting her findings after elections.

Commissioner Inman has also been a member of the State Board of Election Commissioners. While a member of the State Board of Election Commissioners, Commissioner Inman was also elected to a two-year term with the Pulaski County Election Commission but resigned in 2013 to run for Secretary of State. She was re-elected to the Pulaski County Election Commission in May of 2021, and has worked three elections since taking office. Id. 93. Commissioner Inman also has personal experience in training poll workers and other election officials in her duties as Election Coordinator in Pulaski County.

The Court regards Commissioner Inman's testimony as expert evidence, in light of her extensive skills, experience, and training which qualify her as an expert on Arkansas elections and election administration and qualified to give opinion testimony about the impact of the Challenged Provisions on election administrators and voters. Defendants did not object to the Court's qualification of Commissioner Inman as an expert during trial. Commissioner Inman's testimony is also admissible as fact testimony, as it is based on her personal knowledge gained while serving in numerous positions of responsibility concerning election administration.

Commissioner Inman testified that she most recently attended a training for County Boards of Election Commissioners provided by the State Board on February 28, 2022. That training was presented by Daniel Shults, Chris Madison, and Jon Davidson on behalf of the Board.

Commissioner Inman is concerned that each of the Challenged Provisions will impair or forfeit Arkansans' fundamental right to vote.

Commissioner Inman testified about her concerns regarding Act 736. As an elections commissioner responsible for making the final decision of whether to reject or accept signatures on absentee ballots, Commissioner Inman has never received training on how to compare signatures for authenticity. She is similarly unaware of any objective training or standards articulated under Act 736 that clerks must use in their review of absentee ballot application signatures.

In Commissioner Inman's opinion, Act 736's changes to the absentee application process will disenfranchise voters. The previous application process involved more than one signature comparator and allowed clerks to compare application signatures against all the signatures in a voter's record. Clerks typically used the most recent signature on file to make their comparison. Now, under Act 736, they will no longer be able to do this, and

Commissioner Inman thinks this will make it more likely that ballots are rejected.

Commissioner Inman testified that she attended the Board's "2020 County Board of Election Commissioners' Training" led by Director Shults. As part of that training the Board provided guidance regarding signature-comparison in Arkansas elections. Commissioner Inman testified that the training was flawed, vague, and skewed to encourage disqualification of ballots. Part of the Board's guidance said a signature is comparable unless it is "sufficiently dissimilar" to leave the official with "an abiding conviction" that it has been written by someone other than the voter. However, there was no training on the threshold for an abiding conviction. The Board's materials also instruct election officials to determine when the "quantity and severity" of a signature's distinctions "form a convincing case" it has been written by someone other than the voter. But there is no clarification or explanation of when that threshold has been met. The Board provided sample signatures to look at, but they were given only examples of what kinds of signature variations they might see and the decisions they would have to make. Although the training was intended to provide clarity and guidance, the guidance for untrained laypersons was led by untrained

laypersons. Overall, Commissioner Inman felt the training was “all geared towards looking for points of rejections, not to be as fair as possible.”

Commissioner Inman testified that she is concerned about the vagueness of the Board’s guidance and the language of Act 736 because the review process is not standardized or uniform across the state. There is also no guidance regarding what officials should do if they disagree with one another regarding whether a signature matches.

Commissioner Inman mentioned during her testimony what happened when she disagreed with a fellow commissioner on the question of a voter’s signature in the most recent election (she believed that the signature and its comparators were sufficiently similar but the other two commissioners reviewing the signatures disagreed). Commissioner Inman felt they were not “handwriting analysts” sufficiently trained to reject the ballot. The other Commissioners disagreed, believed they were sufficiently trained, and ultimately decided to reject the ballot and disenfranchise that voter.

**Dr. Linton Mohammad**

Dr. Linton Mohammed testified as an expert on behalf of the Plaintiffs. Dr. Mohammed is a forensic document examiner with more than 35 years of experience and holds a Ph.D. in Human Biosciences from La Trobe University in Melbourne, Australia. Approximately 80% of this work



involves comparison of signatures. Most of Dr. Mohammed's research has involved signature evaluation and comparisons.

Dr. Mohammed has authored 18 peer-reviewed papers, is the author of "Forensic Examination of Signatures," and co-authored another book published in 2018. He has testified as an expert in signature comparisons more than 200 times in both civil and criminal cases across the nation. In that time, his testimony has never been rejected by any court and his credentials have never been challenged.

Dr. Mohammed was retained by Plaintiffs to analyze and provide expert opinion testimony concerning Act 736. His testimony, like that of Dr. Mayer, was compelling. Dr. Mohammed testified that although Act 736 requires that signatures on absentee ballot applications and voter registration form look "similar," in his experience, laypersons typically refer to the process of determining whether signatures are "genuine or not genuine"—the determination he seeks to make in examining signatures as a forensic document examiner—by referring to signature "matching." And laypersons typically refer to how they determine whether signatures are genuine or not genuine by saying they look to see whether the signatures are "pictorially similar or dissimilar." In each case, untrained laypersons are

using unscientific language to refer to the process of determining whether signatures are genuine or not genuine.

Dr. Mohammed explained how Act 736 will affect the reliability of the procedures and techniques of the signature verification process for absentee ballot applications. In Dr. Mohammed's expert opinion, by limiting election officials to a single comparator rather than a range of reference signatures, Act 736 will increase the rate at which absentee ballots will be erroneously rejected because signature matching by untrained laypersons is "inherently unreliable." Laypersons are "inherently unreliable" examiners because they are not trained to evaluate the features they are looking at, nor can they properly evaluate the dissimilarities they observe. This makes laypersons more prone to "Type 2 Errors," where genuine signatures are determined to be non-genuine.

Dr. Mohammed testified that signatures vary from one execution to the next. Even when made by the same person, on the same day, within a short period of time, signatures have a wide range of variations. Variations can occur because of the tool used, the platform used, the writer's age, disabilities, or illnesses, among other reasons.

Dr. Mohammed testified that age is a particularly influential factor. Older individuals whose motor skills have deteriorated will have varied

signatures, as demonstrated by the Voter Plaintiffs. Younger voters, who even at 18 years old have not fully developed their motor abilities, may also have signatures that vary from the time of registration to the next election as their motor abilities develop. Additionally, illiterate writers and writers who speak English as a second language tend to have less pen control than other writers and therefore have greater range of variation in their signatures.

Signatures also vary because writers use different styles. Dr. Mohammed testified that a person casually signing for a package at their front door may have a completely different signature just moments later when signing a formal legal document with their attorney. Left-handed persons will also have varied signatures depending upon whether they are using a stylus, writing in a binder, or in a small signature block because of the hook style of writing they use.

Dr. Mohammed testified that in addition to different styles of writing, there are also three different signature styles: text-based, mixed, and stylized. In text-based signatures, the writer's name is legible, while stylized signatures are completely illegible. Mixed signatures combine features of stylized and text-based signatures and have some legible and some illegible features. According to Dr. Mohammed, even trained Forensic

Document Examiners cannot reliably compare signatures made in different styles with each other and would not be able to conclude whether signatures made using different styles are genuine without additional comparators to determine the writer's range of variation. A layperson cannot evaluate signatures of varied styles with any greater reliability, and untrained laypeople are far more likely to conclude erroneously that two such signatures are not genuine because they appear pictorially dissimilar.

Dr. Mohammed testified that any determination whether a signature is genuine or nongenuine depends upon whether the feature or features being examined occur outside "the normal range of variation." But without a range of samples, there is no way to determine "the normal range of variation" and whether a signature's feature is "a variation versus a difference." Any evaluation of comparators without a range of samples would be inconclusive. For that reason, experts agree that document examiners need a minimum of ten comparator signatures to reliably determine whether a signature is genuine.

According to Dr. Mohammed, as unreliable as signature-matching is generally, Act 736 makes the absentee ballot application signature verification process in Arkansas "significantly more unreliable" by limiting county officials to only the signature on the voter's registration form in

determining whether the signature on their absentee ballot application is genuine—giving Arkansas the dubious distinction of being the only state to require a one-to-one comparison for signature matching in electoral processes. By limiting county officials to reviewing only the signature on the voter’s registration application in evaluating whether a signature on an absentee ballot application is genuine, Act 736 makes it impossible for county officials to determine whether features in an absentee ballot application signature fall within a voter’s “normal range of variation.” As a result, county officials are more likely to determine, erroneously, that variations are differences and erroneously reject genuine signatures.

Dr. Mohammed submitted an expert report concluding that Act 736’s, “signature matching rules and procedures, which allow individuals without adequate training—and without guidance—to reject the signatures on absentee ballot applications, will result in a significant number of erroneous rejections.” Pls.’ Ex. 47, at 10. Dr. Mohammed further concluded that, “Arkansas election officials are likely to reject properly completed absentee ballot applications, signed by the correct voter, because of their incorrect determination that the signatures on the absentee ballot applications are not genuine.”

Dr. Mohammed’s expert testimony was not contradicted.

## **Act 973 Proof**

Act 973 shortened the time for in-person return of absentee ballots. Under prior law, designated bearers or persons returning their own absentee ballots in person could deliver the completed ballot to the office of the county clerk on the day before election day. Act 973 shortened the deadline for in-person return of an absentee ballot to the Friday before election day.

### **Dortha Jeffus Dunlap**

Ms. Dunlap is an avid voter who tries to vote in every election. She voted most recently in a February 2022 special election and the 2020 general election, and returned her absentee ballot by mail for the 2020 general election because she had concerns about voting in person. She has opted to vote absentee because it is difficult for her to get to the polls because she is older and suffers from various health conditions which affect her mobility.

However, Ms. Dunlap testified that she is concerned about voting absentee by mail in the future, because of mail delays that she has experienced. For example, she once mailed a Christmas card in mid-December that did not arrive to her friend in New Orleans until mid-

February, and she was shocked it took “two months to travel across two states.”

Ms. Dunlap is a cancer survivor, experiences arthritis and neuropathy in her hands, and uses a wheelchair or walker to get around. The arthritis and neuropathy in her hands makes them stiff and affects her ability to sign her name. Onset of her symptoms is unpredictable and can affect her ability to sign documents from day to day. Her mobility issues prevent her from walking for any serious distance or standing for any period without extreme discomfort. Ms. Dunlap only rarely drives rarely and relies primarily on her family to get around. Because she is driving less and less, Ms. Dunlap does not plan to renew her driver’s license when it expires in August of 2025. She last renewed her driver’s license on September 23, 2021, to purchase a new car with her daughter.

Ms. Dunlap testified that the Challenged Provisions will impair or forfeit her right to vote. She believes that under Act 736 her absentee ballot will be rejected because her arthritis affects her ability to sign her name consistently. The signatures that Washington County has collected for Ms. Dunlap over the years vary significantly.

Ms. Dunlap is concerned Act 973 will affect her ability to vote, because it shortens the time to return her ballot in person. And she is

concerned Act 249 will burden her right to vote because four years after her license expires, she will not have the requisite form of identification to cast a ballot. Although the state offers a free voter ID, the administrative burdens in tandem with Ms. Dunlap's mobility issues will make it difficult for her to obtain such an ID, particularly because Ms. Dunlap expressed concern about imposing upon the younger members of her household for assistance.

### **Nell Matthews Mock**

Ms. Ms. Matthews Mock also believes Act 973 burdens her right to vote because the new deadline eliminates the window of time in which she previously returned her absentee ballot. According to her testimony, she returned her absentee ballot in person during the day or two before election day for a runoff election following the 2020 general election. She did not mail in her absentee ballot because she was concerned it would not arrive in time to be counted because of mail delays. Ms. Matthews Mock would like the opportunity to consider her voting decisions in the days leading up to election day, because she believes citizens ought to make such decisions with care.



## **Jeffrey Rust**

Mr. Rust testified that Act 973 will burden his right to vote because the earlier deadline means he will not be able to wait as long to return his absentee ballot in person as he has in prior years. Additionally, he is concerned that Act 973 reduces opportunities for him to drop off his absentee ballot in person, especially because he is largely dependent on his wife for rides, and she is uncomfortable driving in heavy traffic.

## **Commissioner Susan Inman**

Regarding Act 973, Commissioner Inman testified that in all her years of service in election administration, the deadline to return absentee ballots in person has been the Monday before election day. Commissioner Inman explained that Governor Hutchinson refused to sign Act 973, because, in his words, “[Act 973] unnecessarily limits the opportunities for voters to cast their ballot prior to the election.”

Commissioner Inman agrees with Governor Hutchison that moving the deadline serves no purpose and deprives voters of crucial time to get all the information they need before voting. This is especially important because if an individual votes early or before the deadline, they will not have the opportunity to recall their ballot and change their decision if new information is revealed. Voters often wait until the last minute to cast their

absentee ballots to ensure they can consider late-breaking information before voting.

Furthermore, moving the deadline for in-person return of absentee ballots from the Monday before election day to the Friday before election day provides no administrative benefit because the election workers who handle and canvass absentee ballots are not the same people who staff polling places for early voting and election-day voting, at least in Pulaski County. Based on her experience in election administration, Commissioner Inman believes Act 973 has the potential to confuse experienced voters. For the past thirty years, the deadline for returning absentee ballots in person has been the Monday before election day. Commissioner Inman testified that Act 973's change to the deadline may confuse voters, making it less likely they will return their ballot in time.

For absentee voters who miss the Friday in-person return deadline, mailing the absentee ballot is likely not an option, because the ballot may not arrive by election day. Voters in that situation would have to vote provisionally in person, which is a particularly stressful and uncertain process for voters who presumably had been unable to vote in person had not planned to vote in person. Moreover, Commissioner Inman disputed the purported administrative benefits to election officials of moving the deadline

for returning absentee ballots in person from the Monday before election day to the Friday before election day. According to her testimony, provisional ballots are tendered but not processed until after election day, and must be approved by the County Election Commission.

Due to Commissioner Inman's decades-long experience in election administration in Arkansas, the Court recognized her as an expert witness concerning election administration and procedures in Arkansas. Her testimony about the effect of Act 973 – and the other Challenged Provisions – was not contradicted.

### **Director Daniel Shults**

Director Daniel Shults testified on behalf of the State Board of Election Commissioners (“the Board”). Director Shults formerly served as Legal Counsel to the Board. He testified that the Board is responsible for training local election officials on election laws and receiving and investigating complaints of alleged violations of election laws in Arkansas.

Director Shults testified that the 2020 general election in Arkansas was marked by increased voter turnout and an increase in the number of absentee ballots that were cast. The Board received numerous phone calls and email messages after the November 2020 general election in weeks after the November 2020 general election from members of the public

concerning election security. While the 2020 General Election was the most successful in Arkansas history, public perceptions of election insecurity arose out of misinformation and disinformation promoted on social media outlets and in other public forums.

Director Shults testified that due to the number of voters who contacted the Board with unfounded concerns about election security surrounding the 2020 General Election, the Board issued a typed legal memorandum that explained that election equipment in Arkansas is secure. However, the legal memorandum did not assuage the concerns of ordinary voters, which the Board acknowledged were based on misinformation.

According to Director Shults, Act 736 was crafted to specify the voter registration record election commissioners will use as comparator with the signature on an absentee ballot application to determine if signatures were from the same person. Act 973 was enacted to give election officials additional time to canvass absentee ballots. Act 249 eliminated the affidavit fail-safe formerly provided by registered voters who lacked photo identification.

Director Shults testified that the SBOE received numerous calls and email messages from the public concerning election security. He conceded, however, that the Board is not aware of a single instance of fraud arising

out of alleged false signatures on an absentee ballot application. The Board is not aware of a single prosecution arising out of an alleged false signature on an absentee ballot application.

Director Shults testified that the Board is not aware of a single instance of fraud arising because of the Affidavit Fail-Safe that was eliminated under Act 249. The Board is not aware of any instance in which somebody lied on an Affidavit Fail-Safe. The Board is not aware of any instance in which a prosecuting attorney has charged someone with falsifying an Affidavit Fail-Safe. Director Shults also conceded that Amendment 99 did not require elimination of the Affidavit Fail-Safe and that registered voters who lacked compliant photo identification used the Affidavit Fail-Safe option for years after Amendment 99 was added to the Arkansas Constitution without incident.

Director Shults testified that county clerks—not county election administrators—process absentee ballot applications. The Board provides no training to county clerks on signature comparison or on how to evaluate signature similarity. The Board has no record of how many absentee ballot applications have been rejected on the basis of an alleged signature mismatch.

Director Shults testified that the Board expects signatures to vary over time and the signatures on file may be on file for many years or several decades. To obtain a free voter verification card, voters must travel to their county clerk's office during normal business hours and present two forms of underlying documents to evidence their identity. The Board has no idea how many eligible or even registered Arkansas voters lack such underlying documentation. The Board is not aware of how many, if any, free voter verification cards have been issued since they first became available in 2017. According to Director Shults, the Challenged provisions were enacted to address the impression of election insecurity that was based on misinformation and unfounded allegations about voter fraud surrounding the November 2020 general election.

Director Shults conceded that the words "lawful purposes" as contained within Act 728 do not "add much," but that Act 728 serves to prohibit anyone from entering the 100- foot zone around a polling place unless that person is "ingressing or egressing" from the building where voting is taking place. He admitted that Act 728 does not contain the word "electioneering," in part because electioneering was already illegal within the 100-foot zone around a polling place prior to Act 728. See Ark. Code Ann. § 7-1-103(a)(8). Act 728 does not contain the words "voter

intimidation,” in part because voter intimidation was already illegal prior to Act 728. See Ark. Code Ann. § 7-1-104(a)(5) (it is a “unlawful for any person to make any threat or attempt to intimidate any elector or the family, business, or profession of the elector”); 18 U.S. Code § 594 (“Whoever intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose . . . shall be fined under this title or imprisoned not more than one year, or both.”). Act 728 does not contain the word “loitering,” in part because loitering was already illegal prior to Act 728. See Ark. Code Ann. § 5-71-213.

Director Shults acknowledged that requiring an absentee voter to go to the county clerk’s office to present photo ID in person if the voter is unable to include a photocopy of same along with the absentee ballot would “defeat the purpose” of voting absentee. He also testified that Act 973’s shortening of the deadline for returning absentee ballots in person would alleviate administrative burdens associated with handling absentee ballots in person. Director Shults admitted, however, that the Board has no idea: (1) how many absentee ballots were delivered in person as opposed to delivered by mail in any election before November 2020; or (2) how many absentee ballots were delivered in person on the Monday before

election day in any previous election. When questioned by the Court about the purported rationale for Act 973 – that shortening the return date for in-person submission of absentee ballots from the Monday before election day to the Friday before election day would alleviate administrative burdens related to canvassing absentee ballots – Director Shults admitted that election officials must canvass all absentee ballots as of the end of election day in any event until county clerks certify election returns to the Secretary of State ten (10) days after election day (what the Court termed the “drop dead” date during its questions to Director Shults).

### **Joshua Bridges**

Joshua Bridges testified on behalf of Office of Secretary of State John Thurston. Before assuming his current position (Election Systems Analyst) in 2020, Mr. Bridges worked as Election Coordinator, Voter Services Project Administrator, and Election Services Representative for the Office of Secretary of State. Mr. Bridges testified that the Secretary of State is the chief election official in Arkansas.

Mr. Bridges confirmed that the Secretary of State publicly proclaimed that the November 2020 general election was the most successful in Arkansas history. Despite misinformation on social media about the conduct and integrity of that election, misinformation about security of



election equipment, and voter conduct at the polls, Mr. Bridges testified that the Secretary of State's office was confident that ballots were properly cast and accurately counted in that election.

According to Mr. Bridges, the rationale for Mr. Bridges enactment of Act 249 which removed the affidavit fail-safe for persons who do not have compliant photo identification when seeking to vote is to fulfill the goal of "true voter ID." Mr. Bridges testified that Amendment 99 to the Arkansas Constitution which added the photo identification requirement was ratified by 79.47% of the voters. He testified that Amendment 99 did not mandate elimination of the affidavit fail safe for persons without compliant photo identification and that his office does not know of any instance of fraud associated with registered voters who lack compliant photo identification and use the affidavit method of attesting to their identity and voting eligibility.

Mr. Bridges testified that registered voters can obtain a free voter identification card from their county clerk's office during normal business hours by presenting two forms of underlying documents to evidence their identity. He stated that the Secretary of State's office does not know how many registered Arkansas voters lack such underlying documentation and

does not know how many free voter identification cards have been issued by county clerks across Arkansas since 2017.

Concerning Act 736, Mr. Bridges testified that has no record of how many absentee ballot applications have been rejected on the basis of an alleged signature mismatch. He admitted that “signatures aren’t always perfectly identical,” that they change over time, and that signatures can be affected by age and physical illnesses and conditions (i.e., tremors, neuropathy, bursitis, Parkinson’s Disease, multiple sclerosis, alcoholism, and stroke). He admitted not knowing about any instance of fraud arising out of alleged false signatures on an absentee ballot application and does not know that any criminal prosecution has occurred based on an allegedly false signature on an absentee ballot application.

Mr. Bridges testified that the Secretary of State trains election officials not to look at the actual signature when evaluating whether voter signatures are valid on initiative or referendum petitions. Instead, the Secretary’s Office instructs election officials to compare the voter’s information on the petition, such as name, date of birth, and address, to that same information in the voter registration database, while ignoring the signature mark. Mr. Bridges acknowledged that it is important to prevent fraud in the petition process as it is with voting.

Concerning Act 973, which moved the deadline for in-person return of absentee ballots, allows election officials more time to devote to election day duties because county clerks must devote more time and staff to handle in-person absentee ballots, Mr. Bridges testified that his office does not know as to any election how many absentee ballots were delivered in person as opposed to delivered by hand, and does not know how many absentee ballots were delivered in person on the Monday before election day.

On direct examination Mr. Bridges testified that the goal of Act 728 was to “amend the definition of electioneering.” During cross-examination, he acknowledged that Act 728 does not contain the word “electioneering,” that electioneering was already illegal within the 100-foot zone around a polling place prior to Act 728, and that Act 728 was not needed to address loitering and voter intimidation as that conduct was already illegal according to Arkansas law before enactment of Act 728. He was unable to opine about the meaning of “lawful purpose” within Act 728.

## CONCLUSION

Plaintiffs clearly met their preponderance of the evidence burden to prove that Acts 249, 728, 736, and 973 violate their voting rights under the Arkansas Constitution.

The Court heard uncontradicted evidence that Act 249 eliminated “the affidavit fail-safe” for persons who fail to present compliant photo ID during in-person early or election day voting. Testimony from Plaintiffs, Commissioner Inman, and Dr. Mayer was uncontradicted about how Act 249 will suppress voting and disenfranchise registered Arkansas voters who lack the means, time, or wealth required to procure compliant photo ID and present it to county clerks in order to vote.

It is worth noting that when Governor Asa Hutchinson forgot to bring a compliant photo ID with him to the polls in 2014, he sent an aide to fetch it rather than be forced to cast a provisional ballot.<sup>1</sup> Most voters are not likely to be able to dispatch aides to rescue their right to cast in-person ballots under similar circumstances.

Act 249 eliminates the chance for in person voters to sign a written statement attesting, under penalty of perjury, to their identity and voter eligibility so they may cast a provisional ballot at the polling site. Act 249

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<sup>1</sup> See, [Voter ID-Supporting Candidate Forgets ID, Becomes Latest Victim of Voter ID Law - The Atlantic](#)

also eliminates the chance for voters who cast absentee ballots but lack compliant photo identification to cast their absentee ballots by mail accompanied by a written statement attesting, under penalty of perjury, to their identity and that they are registered to vote, and have their absentee ballots considered as provisional ballots so they can be canvassed and counted by election commissioners. Hence, Act 249 *disqualifies registered voters* who do not possess compliant photo identification from voting, whether in person or by absentee ballot, even if they declare under penalty of perjury that they are who they purport to be and that they are registered to vote.

However, Arkansas does not require photographic proof of identity to register to vote. Arkansas does not require photographic proof of identity when people sign initiative and referendum ballot petitions. The irony of Act 249 is that people who attest, under penalty of perjury, to their identity and voter eligibility are now disqualified from voting their electoral choices because they lack photographic proof of their identity.

Yet, elections officials in charge of safeguarding elections and promoting public confidence in elections and all other persons are allowed to testify in any Arkansas court proceeding every day without being required to produce photographic proof of their identity. They are not

required to bring photo identification to court proceedings. Their opportunity to give testimony in court proceedings is not blocked because they lack photo identification. Their sworn affirmation of self-identity is enough to permit them to testify.

The Court holds that Act 249 does not further the compelling governmental interest of protecting election integrity and promoting electoral confidence. There was no proof during the four-day trial of any fraudulent voting in Arkansas elections. Instead, Director Shults, Mr. Bridges, and Commissioner Inman testified that they know of no evidence of fraudulent voting in Arkansas elections. Secretary of State Thurston publicly boasted that the November 2020 elections in Arkansas were the most successful in history.

Because Plaintiffs proved that Act 249 disqualifies Arkansans who are registered to vote but lack compliant photo identification, Defendants were required to produce proof showing that Act 249 advances the governmental interest in election security and integrity, and that Act 249 is the least restrictive approach for furthering that interest. Defendants did not present that proof.

Arkansas law is clear. Where relevant evidence is within the control of a party in whose interest it would be natural to produce it and that party

fails to do so without satisfactory explanation, the trier of fact may draw the inference that such evidence would have been unfavorable to that party. *See, Arkansas Model Instruction 106A. In this case, the Court need not infer that evidence concerning fraudulent voting in Arkansas is unfavorable to Defendants. The uncontradicted proof in this case is that there is no evidence of fraudulent voting in Arkansas, whether in person or by absentee ballot.* It is beyond ironic, to put it bluntly, that registered Arkansas voters who lack photo identification and attest under penalty of perjury to their identity and voter eligibility can be casually disenfranchised by Act 249 based on purported concerns about voter fraud and election security that election officials admit, under oath and the same penalty of perjury, are baseless or a sham.

The Court also holds that Plaintiffs met the burden of proof by a preponderance of the evidence that the right of registered Arkansas voters who lack compliant photo identification to cast absentee ballots is violated by the provision in Act 736 that limits signature comparison to the signature on one voter registration record. Although Defendants insist that absentee voting is not a right but a choice, the Supreme Court of the United States has made it abundantly clear in numerous decisions that fencing out from the voting franchise a sector of the population because of the way they vote

is constitutionally impermissible and that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. See, *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995 (1972); *Evans v. Cornman*, 398 U.S. 419, 90 S.Ct. 1752 (1970); *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 89 S.Ct. 1886 (1969); *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897 (1969); *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, (1966); *Carrington v. Rash*, 380 U.S. 89, 85 S. Ct. 775 (1965). Defendants cite no law holding that the constitutional mandate of equal protection of the law is satisfied when a state that allows persons who have the right to vote and choose to exercise their voting right by casting absentee ballots can impose conditions on them doing so that effectively disenfranchise them based on age, physical condition, whether they are able to write, and the quality of their penmanship.

The testimony of Dr. Linton Mohammed is clear, convincing, and undisputed that Act 736's, "signature matching rules and procedures, which allow individuals without adequate training—and without guidance—to reject the signatures on absentee ballot applications, will result in a significant number of erroneous rejections." Dr. Mohammed further concluded that, "Arkansas election officials are likely to reject properly



completed absentee ballot applications, signed by the correct voter, because of their incorrect determination that the signatures on the absentee ballot applications are not genuine.” Simply put, there is no evidence that the signature comparison standard prescribed by Act 736 will further the governmental interest in promoting confidence in election integrity and preventing voter fraud.

The Court finds that Plaintiffs met their burden of proof by a preponderance of the evidence that Act 728 violates their rights to freedom of speech and assembly that are protected by the Constitution of Arkansas and the Constitution of the United States. There is no law in Arkansas against being within 100 feet of the primary exterior entrance of a polling location and handing out bottled water, providing comfort to persons who are waiting to enter the polling location, or engaging in other lawful conduct. Defendants presented no evidence showing that giving water and other comfort to persons waiting to enter polling places caused disruptions, civil disturbances, violation of laws against electioneering, loitering, and voter intimidation, or any other offenses.

The Court finds that Plaintiffs met their burden of proof by a preponderance of the evidence that Act 973 violates their right to vote. The evidence was clear and convincing that moving the deadline for in-person

return of absentee ballots from the Monday before election day to the Friday before election day provides no administrative benefit because the election workers who handle and canvass absentee ballots are not the same people who staff polling places for early voting and election-day voting, at least in Pulaski County. Based on her experience in election administration, Commissioner Inman testified that Act 973's change to the deadline may confuse voters, making it less likely they will return their ballot in time. The Court found the testimony of Plaintiffs persuasive that for absentee voters who miss the Friday in-person return deadline, mailing the absentee ballot involves the risk that the ballot may not arrive by election day. Voters in that situation would have to vote provisionally in person which Director Shults and Mr. Bridges concede defeats the whole purpose of voting by absentee ballot. As Governor Hutchinson stated when he refused to sign Act 973, "[Act 973] unnecessarily limits the opportunities for voters to cast their ballot prior to the election."

Furthermore, Defendants presented no proof to substantiate the asserted administrative benefit of shortening the deadline for submission of in-person absentee ballots from the Monday before election day to the Friday before election day. All ballots cast during an election by qualified voters as of the end of election day – including absentee ballots that must

be canvassed – must be processed. Provisional ballots must be analyzed by election officials to determine if they will be counted. Although election day ends the time for casting ballots, election officials are obligated to process and canvass ballots after polls close on election day and for the next ten (10) days in order for county clerks to certify election results to the Secretary of State ten days after election day.

The only way moving the deadline for voters to deliver absentee ballots in person to the Friday before election day will reduce the workload for election officials is if registered voters do not submit absentee ballots or if election officials can disqualify and refuse to canvass absentee ballots from voters delivered to county clerks after the Friday before election day, four days before election day and almost two weeks before county clerks must certify election returns to the Secretary of State. As the Court stated when it announced its decision from the bench on March 18, the law is clear that states may not casually deprive a class of individuals of the right to vote because of some remote administrative benefit. See, *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775 (1965).

As the Court mentioned when it announced its decision from the bench on March 18, the law does not permit Defendants to rely on conjecture, speculation, surmise, misinformation, and fear-mongering about

baseless assertions of voter fraud and election insecurity as substitutes for proof. *Glidewell v. Arkhola Sand & Gravel Co.*, 212 Ark. 318, 208 S.W.2d 4 (1948). However, the evidence presented during the trial of this lawsuit demonstrates that Acts 249, 728, 736, and 973 are based entirely on conjecture, speculation, surmise, misinformation, and fear-mongering about allegations of voter fraud and election insecurity. Defendants concede that concerns about voter fraud and election insecurity in Arkansas are baseless and fabricated. Conjecture, speculation, surmise, misinformation, baseless, and fabricated concerns about voter fraud and election insecurity does not constitute competent evidence no matter whether one applies the rational basis or strict scrutiny standard for evaluating the constitutionality of Acts 249, 728, 736, and 973.

In *Strength to Love*, one of his best-read books, Martin Luther King Jr. offered a prescient critique of what he termed “soft-mindedness” in words that fit this case.

Nothing pains some people more than having to think...Few people realize that even our authentic channels of information – the press, the platform, and in many instances the pulpit – do not give us objective and unbiased truth. Few people have the toughness of mind to judge critically and to discern the true from the false, the fact from the fiction. Our minds are constantly being invaded by legions of half-truths, prejudices, and false facts. One of the great needs of mankind is to be lifted above the morass of false propaganda....

And King added this warning.

We do not need to look far to detect the dangers of softmindedness. Dictators, capitalizing on softmindedness, have led men to acts of barbarity and terror that are unthinkable in civilized society. Adolf Hitler realized that softmindedness was so prevalent among his followers that he said, “I use emotion for the many and reserve reason for the few.” In *Mein Kampf* he asserted: “By means of shrewd lies, unremittingly repeated, it is possible to make people believe that heaven is hell – and hell, heaven... The greater the lie, the more readily will it be believed.”<sup>2</sup>

King did not need to be a lawyer, judge, legislator, or governor to recognize that softminded embrace of what he termed “legions of half-truths, prejudices, and false facts” is a recipe for fascism.

Plaintiffs met their burden to prove that Acts 249, 736, and 973 violate the rights of registered Arkansas voters, and that Act 728 violates the right of Arkansans to assemble and offer expressive non-electioneering speech, conduct, comfort within 100 feet of the primary exterior entrance of a polling place. Defendants failed to show that Acts 249, 728, 736, and 973 further the compelling governmental interest of preventing fraudulent voting in Arkansas and bolstering public confidence in election security.

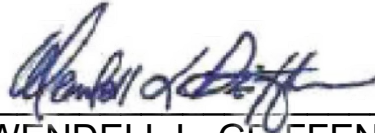
Accordingly, and as the Court announced from the bench on March 18, the Court declares that Acts 249, 728, 736, and 973 are unconstitutional and permanently enjoins their operation and enforcement.

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<sup>2</sup> Martin Luther King Jr., *STRENGTH TO LOVE*, Fortress Press: Philadelphia (1981), pp. 10, 12.

Judgment will be entered for Plaintiffs consistent with this Memorandum Opinion.

ORDERED March 24, 2022.



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WENDELL L. GRIFFEN  
CIRCUIT JUDGE

Courts stand...as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or...non-conforming victims of prejudice and public excitement. *Chambers v. Florida*, 309 U.S. 227 (1940).